Supreme Court, U.S.
FILED

011001 OCT 23 2002

OFFICE OF THE CLERK

(1)

No. _____

In The
Supreme Court of the United States

TROY R. STUART,
Petitioner,

v.

STATE OF OHIO,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI
with Appendix

*** NATHAN A. RAY (0041570)**
BURDON & MERLITTI
137 South Main Street
Suite 201
Akron, Ohio 44308

(330) 253-7171

Attorney for Petitioner
Counsel of Record

December, 2001

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

115 pp

QUESTION PRESENTED

WHETHER, BEFORE A CHILD'S OUT OF COURT STATEMENTS ARE ADMISSIBLE, THE CONFRONTATION CLAUSE REQUIRES THE PROSECUTION TO SHOW THAT THE CHILD WITNESS IS UNAVAILABLE FOR TRIAL, AND IF SO, WHAT THAT SHOWING REQUIRES.

TABLE OF CONTENTS

	PAGE NO.
QUESTION PRESENTED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTIONAL STATEMENT.	2
CONSTITUAIONAL & STATUTORY PROVISIONS	3
STATEMENT OF THE CASE & FACTS	4
PRESERVATION OF FEDERAL QUESTION	6
REASON FOR GRANTING THE WRIT	6

THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WAS VIOLATED BY THE TRIAL COURTS DETERMINATION THAT THE CHILD WITNESS WAS UNAVAILABLE AT TRIAL, THUS PERMITTING HEARSAY STATEMENTS TO BE INTRODUCED, WITHOUT ANY SHOWING FOR THE BASIS OF THE UNAVAILABILITY AND FOR FAILING TO MEET THE APPROPRIATE PARTICULARIZED GUARANTEE OF TRUSTWORTHINESS.

CONCLUSION & PRAYER FOR RELIEF 24

TABLE OF AUTHORITIES

CASES	PAGE NO.
California v. *Green,* 399 U.S. 149, 157 (1970)	13
Coy v. *Iowa,* 487 U.S. 1012, 1016(1986)	12
Dowdell v. *United States,* 221 U.S. 325, 330 (1911)	13
Kentucky v. Stincer, 482 U.S. 730,748, 749-750 (1987)	12
Kirby v. *United States,* 174 U.S. 47, 55 (1899)	13
Idaho v. *Wright,* 497 U.S. 805 (1990)	19
Maryland v. Craig, 497 U.S. 836, 845(1990)	13
Mattox v. *United States,* 156 U.S. 237, 244 (1895)	13
Ohio v. *Roberts,* 448 U.S. 56 (1980)	9
Pennsylvania v. *Ritchie,* 480 U.S. 39, 51 (1987)	12

Pointer v. *Texas,* 380 U.S. 400, 403-405 (1965) 10

Snyder v. *Massachusetts,* 291 U.S. 97, 106 (1934) 13

State v. *Stuart,* 92 Ohio St. 3d 1445 (2001) 2

STATUTES

28 U.S.C. §1257 2

Ohio Rev. Code Ann. Section 2907.02 4

Ohio Rev. Code Ann. Section 2907.05 4

Ohio Evid. R.807 4

APPENDIX:

Denial of Leave to Appeal.....	A1-A1
Opinion of the Ninth District Court of Appeals	B1-B25
Transcript of the Child Victim At Hearing	C1-C19
Opinion of the Summit County Court of Common Pleas	D1-D8
U.S. Code Section 1257	E1-E1
Amendment VI,U.S. Constitution	F1-F1
Amendment XIV,U.S. Constitution	G1-G3
Ohio Rev. Code Ann. Section 2907.02	H1-H4
Ohio Rev. Code Ann. Section 2907.05	I1-I4
Ohio Evid. R. 802.....	J1-J1
Ohio Evid. R. 803.....	K1-K8
Ohio Evid R. 804.....	L1-L3
Ohio Evid. R. 807.....	M1-M3

*NO.*_____

IN THE SUPREME COURT OF THE UNITED STATES

_____ *Term, 2001*

TROY R. STUART

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Petitioner Troy Stuart prays that a Writ of Certiorari issue to review the judgment entry of the Supreme Court of Ohio entered in the above-captioned proceedings on July 25, 2001.

OPINIONS BELOW

The decision of the Supreme Court of Ohio is reported as *State* v. *Stuart,* 92 Ohio St.3d 1445 (2001). (Appendix A) (hereinafter cited as App.) The opinion of the Court of Appeals for Summit County, Ohio, Ninth Appellate District, is unreported and is reprinted in the appendix. (App. B) The opinion of the trial court is unreported and is reprinted in the appendix. (App. D)

JURISDICTIONAL STATEMENT

The Petitioner's convictions and sentences were affirmed by the Ohio Supreme Court on July 25, 2001, when the Court denied his Leave to Appeal.

The jurisdiction of this Court to review the decision of the Ohio Supreme Court is invoked pursuant to Title 28 U.S.C. §1257(a).

CONSTITUTIONAL AND

STATUTORY PROVISIONS

This case involves two (2) Amendments to the United States Constitution:

A) The Sixth Amendment, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of Counsel for his defense.

B) The Fourteenth Amendment, which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

In addition portions of the Ohio Revised Code and Rules of Evidence are pertinent to this case and are reprinted in the appendix.

STATEMENTS OF THE CASE AND FACTS

This case arises as an appeal from the convictions and sentence of the Petitioner for the offenses of Rape by force of an alleged victim under the age of 13 years, R.C. §2907.02(A)(1)(b), and Gross Sexual Imposition, R.C. §2907.05(A)(4). Each of the counts set forth in the indictment related to a single alleged victim, Dylan B. Stuart ("Dylan"), Petitioner's nephew. The indicted offenses were alleged to have occurred between August 1, 1996 and August 7, 1999.

Prior to trial, and pursuant to Ohio Law, the state filed a notice of its intention to use Dylan's statements through other individuals in lieu of live testimony by him pursuant to Ohio Evid. R. 807.

Petitioner opposed the state's Evid. R. 807 Notice. This issue was briefed by both parties and heard by the trial court prior to trial. The trial court found first that five (5) year old Dylan was competent to testify. The court then held a hearing to determine Dylan's availability. Dylan testified but refused to say anything when asked what the Petitioner had allegedly done to him. On cross-examination Dylan would not answer when asked by counsel for Petitioner why he would not say what had happened to him. When further pressed to answer on cross-examination, Dylan repeatedly answered "I don't know." Dylan did not indicate why he would not testify in the courtroom concerning the allege abuse. While not giving a reason for his refusal to testify concerning the abuse, he did testify that his refusal had nothing to do with the Petitioner. Based upon this the trial court determined that Dylan was

unavailable to testify in the case and that his statements were admissible as exceptions to the hearsay rule.

PRESERVATIONS OF FEDERAL QUESTIONS

Petitioner raised the claim that the trial court had improperly admitted the hearsay testimony of the child witness in the Ohio Courts below.

REASON FOR GRANTING THE WRIT

THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WAS VIOLATED BY THE TRIAL COURTS DETERMINATION THAT THE CHILD WITNESS WAS UNAVAILABLE AT TRIAL, THUS PERMITTING HEARSAY STATEMENTS TO BE INTRODUCED, WITHOUT ANY SHOWING FOR THE BASIS OF THE UNAVAILABILITY AND FOR FAILING TO MEET THE APPROPRIATE PARTICULARIZED GUARANTEE OF TRUSTWORTHINESS.

It is Petitioner Stuart's position that the trial court improperly admitted the hearsay testimony of Dylan for two reasons. First, the trial court incorrectly

determined that Dylan was unavailable for purposes of trial, and therefore his hearsay testimony was admissible. Second, that Dylan's statements failed to meet the appropriate particularized guarantee of trustworthiness required for admission under the Confrontation Clause.

The general rule in Ohio concerning hearsay is that it is inadmissible.[1] However, there are a number of exceptions to this rule. Specifically as it relates to this case, Ohio Evidence Rule 807 permits the introduction of a child's hearsay statements in abuse cases provided that the child witness is declared unavailable, and then a determination is reached concerning the factors set forth in the rule.[2]

---

[1] See appendix, J.

[2] See appendix, M.

The procedural aspects of Ohio Evidence Rule 807 were followed in this case, with the end result being a hearing on both the competency of the child to testify,[3] as well as a hearing to determine if Dylan was available to testify. After hearing testimony from the five (5) year old in chambers, the trial court determined that he was competent to testify. The court then held the second phase of the hearing to determine whether, as a competent witness, Dylan would be willing to testify concerning the alleged sexual abuse. Dylan testified at the hearing but refused to say anything when asked what the Petitioner had allegedly done to him. On cross- examination Dylan would not answer when asked by counsel for Petitioner why he would not say what had happened to him. When further pressed to answer on cross-examination, Dylan

[3] See appendix, K.

repeatedly answered "I don't know." On further cross-examination, he denied telling Susan Burgess or Cindy Hailey anything about the allegations.[4] Dylan did not indicate why he would not testify in the courtroom concerning the alleged abuse. While not giving a reason for his refusal to testify concerning the abuse, he did testify that his refusal had nothing to do with the Petitioner. (The complete testimony of Dylan is set forth in the attached App C). Based upon this the trial court determined that Dylan was unavailable to testify in the case and that his statements were admissible as exceptions to the hearsay rule. Once again, it is Petitioner Stuart's position that this finding violated the Confrontation Clause.

---

[4] Cindy Hailey testified at Petitioner's trial concerning the hearsay statements allegedly made to her by the child. Susan Burgess testified at trial, but for the defense.

The Sixth Amendment Confrontation Clause, made applicable to the states through the Fourteenth Amendment, states that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[5]

In *Ohio* v. *Roberts,* 448 U.S. 56, (1980), this Court found that the deposition of a witness who had testified at a preliminary hearing and was subject to a cross-examination, but who was unavailable for the trial, could be admitted at trial.

In finding as it did, this Court noted that:

> "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In

[5] *Pointer v. Texas*, 380 U.S. 400, 403-405 (1965); Davis v. Alaska, 415 U.S. 308, 315 (1974).

> other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* at 66. (footnote omitted).

Given the facts of *Roberts,* that the witness' whereabouts were not known, and that even her parents did not know where she could be found, the court found that the state had met the requirement of unavailability. *Roberts* at 77. In the case *sub justice,* the court found that the five (5) year old was competent to testify. However, as the facts establish, the court found Dylan unavailable to testify merely because he simply refused to answer questions, without ever stating the basis or reason why he did not want to testify. Trial counsel vigorously opposed the court's finding that Dylan was unavailable. Trial counsel went so far as to request during its case that the court permit him to call Dylan as a witness. The

court summarily overruled this request. In its decision, the trial court noted that "the unavailability is not with respect to his physical presence as he could be picked up and physically placed in the courtroom; the real issue is whether this 5 year old child will be able to give testimony about events at issue in this case. The court finds ample evidence to prove to a satisfaction that Dylan Stuart would not give testimony on the issues and is therefore not reasonably available." This finding was clearly incorrect based upon this Court's rulings.

This court has noted that ". . . the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the triar of fact." *Coy* v. *Iowa,* 487 U.S. 1012, 1016 (1986).[6] This court has

[6] Citing *Kentucky* v. *Stincer,* 482 U.S. 730, 748, 749-750 (1987) (Marshall, J. dissenting); see also *Pennsylvania* v. *Ritchie,* 480 U.S. 39,51 (1987) (Florality opinion);

further noted however that "[w]e have never held, however, that the Confrontation Clause guarantees criminal defendants the absolute right *to* a face-to-face meeting with witnesses against him at trial." *Maryland* v. *Craig,* 497 U.S. 836, 845 (1990). But before a trial court can deny a defendant the protected right of confrontation a substantial showing must first be met by the state. This substantial showing was addressed in *Craig, supra.*

In *Craig* this court addressed whether the placement of a child victim in a room separate and apart from the defendant and the jury to testify violated the right of confrontation. The court in *Craig*

California v. *Green,* 399 U.S. 149, 157 (1970); *Snyder* v. *Massachusetts,* 291 U.S. 97, *106* (1931); *Dowdell* v. *United States,* 221 U.S. 325, 330 (1911); *Kirby* v. *United States,* 174 U.S. 47,55 (1899); *Mattox* v. *United States,* 156 U.S. 237,244 (1895).

recognized that the right of confrontation ". . . is to insure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the triar of fact." *Id.* at 845. In its discussion of what must be established before the constitutional right to Confrontation can be avoided, the *Craig* Court noted that ". . . our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial. Confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Craig* at 851. The *Craig* court set forth that more is needed than a witness's unwillingness to testify:

> "[t]he requisite finding of necessity must, of course, be a case specific one: the trial court must hear evidence

> and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who proceeded to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of defendant. . . .Denial of face- to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary, because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than deminimis, i.e., more than 'mere nervousness or excitement or some reluctance to testify." *Craig* at 855-856. (citations omitted.)

Given the facts of the case *sub judice*, the trial court denied Petitioner Stuart his right of confrontation

by finding that the victim was unavailable. There was no indication from the child's testimony that he would be traumatized by having to testify in the presence of the Petitioner. Nor was this finding made by the trial court. Further, the state interest in not having a witness testify must be more than the trauma of the courtroom generally, which was not the case either. Rather, the record here supports the conclusion that the child witness simply did not want to answer questions concerning the abuse. This cannot give rise to a finding that a child witness is unavailable and that therefore the Confrontation Clause is negated. As this Court has found, where an alternative to face-to-face confrontation is presented, the state must make a showing of traumatization to the victim because of the presence of the defendant. No less can be expected where the defendant is completely denied the right of

Confrontation by the state, such as in the case *sub judice.*

In *Craig,* this Court did not find it necessary to determine the minimum showing of emotional trauma required for the use of the special procedure of a child witness testifying because there was a Maryland statue which dealt with this. This Court found that the statute met constitutional standards. *Id.* at 856. Ohio does not have any such provision for determining the level of emotional trauma a child witness must suffer before a finding of unavailability. This Court declined to address this issue in *Idaho* v. *Wright,* 497 U.S. 805 (1990).[7] Petitioner Stuart now invites this Court to address this issue.

---

[7] "[W]e first note that this case does not raise the question whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires the prosecution to show that a child witness is unavailable at trial-and, if so, what that showing requires." *Wright* at 816-17.

As set forth above, Maryland has provided a means by which a child witness can testify if the trial court finds that the child will suffer emotional distress if required to testify in front of the defendant. This Court found that Maryland's special procedure of testimony by one-way closed circuit television "... adequately ensures the accuracy of the testimony and preserves the adversary nature of the trial." *Id* at 857. Maryland's one-way closed circuit television at least preserved the important and necessary elements of the confrontation Clause. The child witness is competent and testifies under oath, the defendant retains the right of cross-examination and the judge, defendant and jury are able to see the witness's demeanor. *Id.* at 851. Ohio has no such special procedure. Therefore, once the trial court determines a child witness unavailable, it then determines whether the statements of the child are admissible as exceptions to the hearsay rule. If the

exception is found to apply, then the jury never hears from the child witness at all. Ohio's statutory provisions completely eviscerates the Confrontation Clause.

This concern was addressed by this Court in *Idaho* v. *Wright,* 497 U.S. 805 (1990). In *Wright,* the youngest daughter, who was three (3) years old at the time of trial, was found "not capable of communicating to the jury." *Wright* at 809. The issue before the trial court then centered around the admission of certain statements made by the younger daughter to a pediatrician in response to questions he asked regarding the alleged abuse. The trial court admitted, pursuant to an exception to the hearsay rule, the child's statement to the pediatricians concerning the sexual abuse. This Court found that this violated the defendant's Confrontation Clause rights.

In reaching its decision, this court examined whether the state had carried its burden of proving that the minor witnesses incriminating statement had sufficient indicia of reliability to withstand scrutiny under the confrontation clause. In answering this question, the court declined to set a preconceived and artificial litmus test. *Id.* at 819. Instead the court noted that "[w]e agree that 'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances, but we think that the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of relief." *Id.* The court went on to note that "[i]n other words, if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial." *Id.* at 820. The

court further clarified this by noting that "[t]he circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made, and do not include those that may be added by using hindsight." *Id.* (citation omitted). Nor does the use of corroborating evidence tend to establish a particularized guarantee of trustworthiness. The reason for this is that "... hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* at 822.

The trial court determined that there was a guarantee of trustworthiness to the child witness's statements which, according to Evidence Rule 807, the test of cross-examination would add little to. However, this finding contradicts the limited testimony of the child witness at the hearing. There the child denied

that he had told Cindy Hailey what had happened. However, Ms. Hailey testified at trial as to what the child had told her. Ms. Hailey however disliked Petitioner immensely. She believed that Petitioner had broken into her garage. Dylan also testified that he had lied a little bit to a lady in Pennsylvania whom he had discussed the abuse with. There is much to the testimony of the child that could have been added through the test of cross-examination. In this case, Petitioner Stuart submits that the guarantee of trustworthiness was absent when considering the totality of the circumstances surrounding the making of the alleged statements.

There is no guarantee of trustworthiness to the child witness statements. By determining that there was the trial court denied Petitioner Stuart the

opportunity to cross- examine the witness against him in violation of the Confrontation Clause.

This Court also noted in *Wright* that Idaho's residual hearsay exception under which the hearsay was admitted was not a firmly rooted hearsay exception for confrontation clause purposes. *Id.* at 817. This is the same for Ohio's hearsay exception under which the statements were admitted in this case. If every residual hearsay exception automatically passed the Confrontation Clause scrutiny, the exceptions would defeat the rule. The child witness's hearsay statements do not fall within a firmly rooted exception to the hearsay rule, they are "presumptively unreliable and inadmissible for Confrontation Clause purposes." *Id.* at 818.

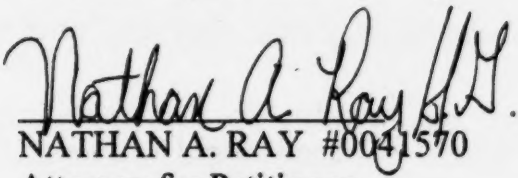
The trial court erred by allowing Dylan's out of court statements to be introduced at trial through other

witnesses, in violation of the right to confrontation under the Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION AND PRAYER FOR RELIEF

Petitioner STUART prays that this Court grant his petition for writ of certiorari to determine whether, before a child's out of courts statements are admitted, the Confrontation Clause requires the prosecution to show that a child witness is unavailable at trial and if so, what that showing requires.

Respectfully submitted,



NATHAN A. RAY #0041570
Attorney for Petitioner
137 South Main Street
Suite 201
Akron, Ohio 44308
330-253-7171

Table of Appendix Contents

SUPREME COURT OF OHIO FILING:

Denial of Leave to Appeal,
filed 7/25/01 ..... A1-A1

NINTH JUDICAL DISTRICT
COURT OF APPEALS FILINGS:

Decision and Journal Entry,
filed 4/4/01 ..... B1-B25

Hearing Transcript of 2/17/00,
filed 9/8/00 ..... C1-C19

COUNTY OF SUMMIT
COURT OF COMMON PLEAS FILINGS:

Order,
filed 3/21/00 ..... D1-D8

Table of Appendix Contents

OTHER:

U.S. Code Section 1257 . . . . . E1-E1

Amendment VI, U.S. Constitution F1-F1

Amendment XIV, U.S. Constitution G1-G3

Ohio Rev. Code Ann. Section 2907.02 . . . . . H1-H4

Ohio Rev. Code Ann. Section 2907.05 . . . . . I1-I4

Ohio Evid. R.802 . . . . . J1-J1

Ohio Evid. R.803 . . . . . K1-K8

Ohio Evid. R.804 . . . . . L1-L3

Ohio Evid. R.807 . . . . . M1-M3

92 Ohio St.3d 1445, 751 N.E.2d 483, State v. Stuart, (Ohio 2001)

*1445 92 Ohio St.3d 1445

751 N.E.2d 483

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned 'Supreme Court of Ohio Motion Tables'.)

Supreme Court of Ohio

State
v.
Stuart

No. 01-954
July 25, 2001

DISMISSAL, SUA SPONTE, NO SUBSTANTIAL CONSTITUTIONAL QUESTION AND DISCRETIONARY APPEALS, IF APPLICABLE, NOT ALLOWED

Summit App. No. 20111.

Copyright (c) West Group 2001 No claim to original U.S. Govt. works

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
) **ss:**
COUNTY OF SUMMIT)

STATE OF OHIO,
Appellee,

v. **Case No. 20111**

TROY R. STUART,
Appellant.

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE NO. CR 99 10 2211

DECISION AND JOURNAL ENTRY

Dated: April 4, 2001

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

Appellant-defendant Troy R. Stuart appeals the order of the Summit County Court of Common Pleas convicting him of two counts of rape and one count of gross sexual imposition. This Court affirms.

I.

The Summit County Grand Jury indicted Troy R. Stuart on two counts of rape, in violation of R.C. 2907.02 (A)(1)(b); and one count of gross sexual imposition, in violation of R.C. 2907.0 5(A)(4). Troy's nephew, a five year-old child ("the child"), was the victim of Troy's alleged sexual abuse. Stuart pled not guilty, and the matter proceeded to trial.

At the close of the trial, the jury found Stuart guilty as charged. The trial court sentenced Stuart to life imprisonment on each of the two counts of rape, and to one year on the one count of gross sexual imposition, and ordered the sentences to be served concurrently.

Stuart timely appeals, alleging seven assignments of error.

II.

FIRST ASSIGNMENT OF ERROR

EACH OF THE GUILTY VERDICTS IN THE INSTANT CASE WAS AGAINST. THE MANIFEST WEIGHT OF THE EVIDENCE AT TRIAL HEREIN, AND ACCORDINGLY IN VIOLATION OF DEFENDANT'S RIGHTS AS GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE [UNITED STATES] CONSTITUTION.

SECOND ASSIGNMENT OF ERROR

DEFENDANT'S CONVICTIONS HEREIN ARE BASED ON INSUFFICIENT EVIDENCE, AND SHOULD THEREFORE BE REVERSED, AND FINAL JUDGMENT ENTERED FOR DEFENDANT. THESE CONVICTIONS, NOT SUPPORTED BY SUFFICIENT EVIDENCE, ARE IN VIOLATION OF DEFENDANT'S RIGHT TO DUE PROCESS AS GUARANTEED TO HIM BY THE FOURTEENTH AMENDMENT TO THE [UNITED STATES] CONSTITUTION.

The foregoing assignments of error are reviewed together as they raise similar issues of law and fact.

In his first and second assignments of error, Stuart argues that his convictions for two counts of rape and one count of gross sexual imposition are against the manifest weight of the evidence and are not supported by sufficient evidence. **This Court disagrees.**

A. Standards of Review

As a preliminary matter, this Court notes that sufficiency of the evidence produced by the state and weight of the evidence adduced at trial are legally distinct issues. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. In conducting a sufficiency of the evidence review, all evidence must be construed in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "In essence, sufficiency is a test of adequacy." *Id.* at 386. "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), Summit App. No. 19600, unreported, citing *Thompkins, supra,* at 390 (Cook, J., concurring). When a defendant asserts that his conviction is against the manifest weight of the evidence, an

appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten* (1986), 33 Ohio App. 3d 339, 340. This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *Id.*

B. Rape

Stuart was convicted of two counts of rape. Rape is proscribed by R.C. 2907.02(A)(1)(b), which provides:

> (A)(l) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
>
> ***
>
> (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

The definition of "sexual conduct" includes fellatio. R.C. 2907.01(A).

In the instant case, the child victim disclosed two instances of rape to several responsible adults. The child's father, Lorin Stuart, learned from his sister that the child was improperly touching himself. The child stated that he touched himself because Troy Stuart did it. Lorin asked the child about what had happened with Troy. The child then disclosed to Lorin and the child's mother, Lisa Stuart, that Troy was putting his mouth on the child's penis, and that the child was putting his mouth on Troy's penis. The child also repeated the disclosure to Detective Terra Johnstonbaugh of the Springfield Township Police Department and to his cousin, Cindy Hailey.

Det. Johnstonbaugh obtained a search warrant for Troy's residence. Det. Johnstonbaugh discovered a drawing of two stick figures, an adult and a child, each depicted with a penis and testicles.

After the allegations came to light, Lisa happened to see Troy, who told her that "I have my monsters, too." After Troy was arrested Lorin and his father searched Troy's residence and found a letter written by Troy. Lorin testified that the letter stated "I have monsters, too. *** I prey upon kids because they don't hurt me."

This Court concludes that Stuart's two convictions for rape were supported by sufficient evidence and by the manifest weight of the evidence.

C. Gross Sexual Imposition

Stuart was convicted of one count of gross sexual imposition, in violation of R.C. 2907.05(A)(4), which provides:

> (A) No person shall have sexual contact with another *** when any of the following applies:
>
> ***
>
> (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

"Sexual contact" means the touching of the erogenous zone of another including the genitals and pubic region. R.C. 2907.0.1(B).

In the instant case the child disclosed to his mother Lisa that Troy played with the child's penis. Based also on the additional facts set forth in the analysis of the rape convictions, this Court concludes that Stuart's conviction for gross sexual imposition was supported by sufficient evidence and by. the manifest weight of the evidence.

Troy's first and second assignments of-error are overruled.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING DEFENDANT-APPELLANT'S PRETRIAL MOTION AND REQUEST TO EXCLUDE OUT-OF-COURT STATEMENTS BY THE ALLEGED VICTIM FROM BEING INTRODUCED THROUGH THE TESTIMONY OF OTHER WITNESSES, IN VIOLATION OF EVID.R. 807 AND OF EVID.R. 802, AND BY ALLOWING SUCH HEARSAY TESTIMONY TO BE INTRODUCED BY THE STATE, OVER OBJECTION, AT TRIAL, IN VIOLATION OF DEFENDANT'S RIGHTS AS GUARANTEED TO. HIM BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE [UNITED STATES] CONSTITUTION; THE TRIAL COURT COMMITTED FURTHER PREJUDICIAL ERROR BY. FAILING TO RE-INTERVIEW THE ALLEGED VICTIM ON THE RECORD IMMEDIATELY PRIOR TO, OR DURING TRIAL, TO ESTABLISH WHETHER THE ALLEGED VICTIM WAS THEN ABLE TO TESTIFY CONCERNING THE ALLEGATIONS.

In his third assignment of error, Stuart claims that the trial court improperly admitted the child's out-of-court statements in trial pursuant to Evid.R. 807. **This Court disagrees.**

"The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 1.73, paragraph two of the syllabus. An abuse of discretion is more than an error of law or judgment, but rather demonstrates a "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. In conducting an abuse of discretion review, an appellate court may not substitute its judgment for that of the trial court. *Id.*

Evid.R. 807 permits the admission of out-of-court statements made by a child under twelve years of age describing sexual or physical abuse as an exception to the rule against hearsay upon the satisfaction of four conditions: (1) The court finds that the under the totality of the circumstances the statements bear particularized guarantees of trustworthiness bearing demonstrable indicia of reliability; (2) The child's testimony is not reasonably obtainable by the proponent of the statement; (3) There is independent proof of the sexual act; (4) At least ten days before the trial or hearing a proponent of the statement has

notified the other party of the content of the statement, the time and place the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that indicate its trustworthiness.

Before admitting evidence under this rule, the trial court must hold a hearing and must find on the record that each of the four requirements of Evid.R. 807(A) have been satisfied, accompanied with the bases for such findings. Evid.R. 807(C); *State v. Said* (1994), 71 Ohio St.3d 473, 477.

A. Particularized Guarantees of Trustworthiness

As a threshold matter, the trial court must determine whether the circumstances demonstrate that there are particularized guarantees that the child's statement is trustworthy. This Court's analysis is informed by consideration of...

> spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement.

Evid.R. 807(A)(l). In determining the trustworthiness of a statement, independent evidence of a sexual act cannot be used to bolster the statement because such evidence is not to be considered as part of the analysis. *Id.*

In the instant case the child made the statements to his parents Lorin and Lisa Stuart, his cousin, Cindy Hailey, his aunt, Susan Burgess, and Det. Johnstonbaugh. The child disclosed how Troy touched and put his mouth on his "pee-pee," and how Troy compelled the child to touch and put his mouth on Troy's penis. The child indicated that he liked "Uncle Troy" when he was not made to touch Troy or when Troy did not touch him. The child's parents enjoyed previously good relations with Troy, and had entrusted him to care for the child prior to the disclosures. There is nothing in the record that reflects a motive to lie. Moreover, the explicit sexual nature of the child's disclosure (especially considering he was five years-old) is demonstrative of the trustworthiness of the statement. Lastly, the child's disclosures bear some spontaneity. The disclosures came after the child's aunt asked why he was improperly touching himself, and the child replied because Troy "does it." Accordingly, this Court concludes that there was sufficient indicia of trustworthiness to support the trial court's findings.

B. Testimony Not Reasonably Obtainable

A trial court must also determine whether a child's testimony is "not reasonably obtainable by the proponent of the statement." Evid.R. 807(A)(2). In *State v. Robertson* (Feb. 2, 2000), Summit App. No. 19072, unreported, this Court held that a child victim who was uncooperative when asked questions during a pre-trial hearing was properly determined to be "unavailable" for trial by the trial court. Likewise in the instant case, the child would not answer specific questions about the sexual abuse he suffered during a pre-trial hearing. Accordingly, the trial court properly concluded that the child was unavailable for trial.

C. Independent Proof

The third requirement of Evid.R. 807 is that the proponent demonstrate independent proof of the sexual act. On this point, the state improperly engages in some sleight of hand by attempting to buttress the trial court's pre-trial ruling with testimony from the trial itself. This Court then looks solely to the four corners of the 807 hearing in conducting its review of whether the proponent set forth independent proof of the sexual acts.

In the instant case, the child's aunt, Susan Burgess, and his cousin, Cindy Hailey, observed the child improperly

touching himself. When admonished to stop, the child replied that "Uncle Troy does." The child frequently wet his bed, and refused to sleep in his bed (the situs of the sexual abuse). The child's father, Lorin Stuart, and the child's grandfather found a letter in Troy's residence in which Troy stated "I've got monsters, too. *** I prey upon kids because they don't hurt me." Troy's letter constitutes a *de facto* confession, which is independently probative of the sexual abuse suffered by the child. See Evid.R. 807(A)(3); *State v. Robertson* (Feb. 2, 2000), Summit App. No. 19072, unreported, citing *In re Bright* (July 31, 1995), Clinton App. No. CA94-10-027, unreported. Taken together, the foregoing constitutes independent proof of the sexual acts suffered by the child.

D. Notice of Intent to Use Statements

The final requirement is that the state must notify the opposing party at least ten days before the hearing. Evid.R. 807(A)(4). To be effective, the notice must include the content of the statement, the time and place the statement was made, the identity of the witness who is to testify regarding the statement, and the circumstances that demonstrate its trustworthiness. *Id.*

In the instant case, the state served its notice on February 4, 2000. The hearing was held on February 17,

2000. The notice adequately outlined the testimony taken at the 807 hearing. The fourth requirement of Evid.R. 807(A) was satisfied in the case at bar.

E. "Trusted Person"

Lastly, Stuart argues in his brief that there was no "trusted person" present during the child's pre-trial testimony. See Evid.R. 807(B)(1). However, at trial, it was counsel for Stuart who hectored the trial court into barring the child's parent from the courtroom. The trial court noted on the record that counsel "threw a fit and demanded that nobody be here. We did have a parent here with him in the beginning and you particularly would not have that."

The doctrine of invited error halts Stuart's attempt on appeal. Under that doctrine, "a party will not be permitted to take advantage of an error which he himself invited or induced the court to make." *State v. Brintzenhofe* (May 12, 1999), Summit App. No. 18924, unreported, quoting *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus. Stuart cannot now benefit from his' demand that the child's "trusted person(s)" be removed from the courtroom during the child's pre-trial testimony.

F. Summary

The record before this Court supports the trial court's findings that the child's statements were admissible through the testimony of the other witnesses presented under Evid.R. 807. This Court cannot say that the trial court's ruling constituted an abuse of discretion. The third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING, OVER OBJECTION, STATE'S EXHIBIT 3, A HANDWRITING SAMPLE OF DEFEND ANT INTO EVIDENCE.

FIFTH ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING, OVER OBJECTION, STATE'S EXHIBIT 4 INTO EVIDENCE, IN VIOLATION OF DEFENDANT'S RIGHTS AS GUARANTEED TO HIM BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE [UNITED STATES] CONSTITUTION.

The foregoing assignments of error are reviewed together as they raise similar issues of law.

In his fourth assignment of error, Stuart claims that the trial court erred when it admitted his handwriting sample into evidence. In his fifth assignment of error, Stuart argues that a drawing found in his residence of an adult and child stick figure each depicted with a penis and testicles was improperly admitted at trial. **This Court disagrees.**

As set forth above, the standard of review regarding the trial court's admission of evidence is a familiar one. "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *Sage, supra,* at paragraph two of the syllabus. An abuse of discretion is more than an error of law or judgment, but rather demonstrates a "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons, supra,* at 621. In conducting an abuse of discretion review, an appellate court may not substitute its judgment for that of the trial court. *Id.*

Evid.R. 401 defines relevant evidence, as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence."

Turning first to the handwriting sample, the trial court properly admitted the exhibit. Specifically, the exhibit was handwritten letter by Troy to Lorin Stuart offered to show that Troy prints when he writes, that Troy regularly memorializes his thoughts by writing, and that Troy misspells several words. All of these considerations corroborate the testimony of Lorin Stuart and his discovery of a *de facto* confession letter written by Troy. Accordingly, this Court cannot say that the trial court abused its discretion in admitting the letter as relevant evidence.

As for the drawing found at Troy's house of a man and child each depicting a penis and testicles, the exhibit was probative of Troy's view of children as sexual objects, and indeed may even be intended to actually depict Troy and the child. This exhibit was appropriately 'regarded as relevant by the trial court considering Troy was on trial for acts of sexual abuse committed against a child. See Evid.R. 401. Therefore, the trial court did not abuse its discretion in admitting the exhibit.

The fourth and fifth assignments of error are overruled.

SIXTH ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING A STATE'S WITNESS, LORIN STUART, TO TESTIFY OVER DEFENDANT-APPELLANT'S OBJECTION, CONCERNING THE CONTENTS OF A LETTER DEFENDANT HAD ALLEGEDLY WRITTEN, WHICH LETTER COULD NOT BE PRODUCED BY THE STATE, IN VIOLATION OF DEFENDANT- APPELLANT'S RIGHTS. AS GUARANTEED TO HIM BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE [UNITED STATES] CONSTITUTION.

In his sixth assignment of error, Stuart argues that the trial court erred when it allowed Lorin Stuart to testify as to the contents of a letter he found at Troy's residence. Stuart's argument is without merit.

The exhibit in question is a letter found by the child's father, Lorin Stuart, at Troy's residence, and written in Troy's hand, which contained inculpatory statements such as "I have monsters, too. *** I prey upon kids because they don't hurt me." In addition to Lorin Stuart, the child's grandfather saw the letter. The letter was lost before trial.

At trial, Lorin Stuart was permitted to testify as to the contents of the letter he discovered from his memory.

Evid.R. 1002 requires that to prove the contents of a writing, the original is required "except as otherwise provided in these rules or by statute[.]" However, Evid.R. 1004 provides that "[t]he original is not required, and other evidence, of the contents of a writing *** is admissible if: (1) *Originals lost or destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]" The Staff Note to Evid.R. 1004 states "[i]t has long been the case law of. Ohio that any other evidence of content is admissible when the original is lost or destroyed." (Emphasis added.) (Citations omitted.) Direct testimony as to the content of a writing is appropriate when the original is lost or destroyed. *See Nugent v. Himmelhaver* (Jan. 15, 1986), Hamilton App. No. C-850031, unreported; *BancOhio Nat 'l Bank v. Cousins* (May 31, 1984), Franklin App. No. 83AP-937, unreported.

In the instant case, there was unequivocal testimony that the letter written by Troy and discovered by Lorin Stuart was lost. As a result of the loss any evidence of content was admissible at trial. Here, the evidence of the letter's content was the direct testimony of Lorin Stuart, which is in harmony with Evid.R. 1004. See, also, *Nugent,* and *BancOhio Nat 'l Bank, supra.*

Stuart next argues, in a lone sentence without any accompanying authority, that the contents of the letter "are inadmissible hearsay, pursuant to Evid.R. 802." However, Stuart's argument fails under Evid.R. 801(D)(2), which states that an admission by a party-opponent is not hearsay.

Lastly, Stuart argues that the testimony about the letter should have been excluded because it was prejudicial. Evid.R. 403(A) governs the exclusion of relevant evidence on grounds of prejudice, which provides: "[a]though relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice[.]" However, as discussed above, the contents of the letter constitute a de facto confession of the crime, and are highly probative of Stuart's guilt. Accordingly, this Court concludes that the high probative value of the evidence is not outweighed by the danger of unfair prejudice.

This Court cannot conclude that the trial court abused its discretion in admitting Lorin Stuart's testimony regarding Troy's letter. *Sage, supra.* Accordingly, the sixth assignment of error is overruled.

SEVENTH ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING DEFENDANT'S REQUEST TO CALL DYLAN STUART, A MINOR CHILD, AS A DEFENSE WITNESS, IN VIOLATION OF DEFENDANT'S RIGHTS AS GUARANTEED TO HIM BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE [UNITED STATES] CONSTITUTION.

In his seventh assignment of error, Stuart claims the trial court erred when it declined his request to call the child victim as a defense witness and conduct another voir dire of the victim after the trial had commenced. This claim is without merit.

As discussed *infra* in the second assignment of error, under Evid.R. 807 the trial court is charged with making a four part finding, among which is that the "child's testimony is not obtainable by the proponent of the statement." Evid.R. 807(A)(2). Considering that Evid.R. 807 presents a hearsay exception rendering the child's statements made to others admissible at trial upon satisfaction of the four part test discussed above, a child is quite clearly not available to be called as a witness at trial. The

Ohio Supreme Court squarely addressed and endorsed the determination of the child declarant's availability at the pre-trial stage:

> We hold that the determination of a child declarant's availability is best made at a pretrial proceeding. Evid.R. 807 contemplates that a pretrial hearing will be conducted at which time the ability of the child to testify should be addressed and an initial determination as to the admissibility of the child's statements should be made. This would allow both parties to prepare for trial in accordance with the trial court's ruling. A pretrial hearing would also permit an interlocutory appeal if the trial court's ruling on the child's availability and/or the admissibility of the child's extrajudicial statements so hinders the state's evidence that the state cannot proceed with its case. *See State v. Malinovsky* (1991), 60 Ohio St.3d 20.

State v. Storch (1993),66 Ohio St.3d 280, 293. This Court construes Evid.R. 807 to mean that when a child's testimony is determined to not be reasonably obtainable at trial, the child declarant may not be called to undergo a redundant voir dire or as a witness at trial. A contrary construction is one that would effectively swallow up Evid.R. 807, disregard the procedural pre-trial regime of

Evid.R. 807, disrupt the proceedings of the trial, unnecessarily subject child victims to a crucible of defense counsel questions even though the child has already demonstrated a refusal to answer questions, and defy Ohio Supreme Court precedent. See *Storch, supra,* at paragraph two of the syllabus. Accordingly, the trial court properly construed Evid.R. 807 in denying Stuart's request to call the victim to testify at trial.

Having concluded that, as a matter of law, Evid.R. 807 does not permit a child to be called as a witness after a trial court has found the child's testimony to be not reasonably obtainable, this Court next turns to Stuart's summary argument that he was denied his right to confrontation at trial. Specifically, the trial court denied Stuart's request to call the child victim to the stand during the trial. This question has been settled for over seven years.

"Evid.R. 807 accords with the right of confrontation guaranteed by both-Section 10, Article I of the Ohio Constitution and the Sixth Amendment to the Constitution of the United States." *Storch, supra,* at paragraph one of the syllabus. Therefore, Stuart's confrontation clause argument is without merit.

Accordingly, the seventh assignment of error is overruled.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the County of Summit, Court of Common Pleas, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to appellant.

Exceptions.

/s/ Donna J. Carr
DONNA J. CARR
FOR THE COURT

BAIRD, P.J.
SLABY, J.
CONCUR

APPEARANCES:

PETER T. CAHOON, Attorney at Law, 50 S. Main Street, P.O. Box 1500, Akron, Ohio 44309-1500, for appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, MELISSA DAY, and PHILIP BOGDANOFF, Assistant Prosecuting Attorneys, 53 University Avenue, Akron, Ohio 44308, for appellee.

MR. WEBER: Because she's counseled this child about what to say and how to say it. And she's an advocate and she will be subpoenaed to testify in this case.

THE COURT: Whatever you want to do. Right now we will concentrate on Dylan.

MR. CARROLL: Do you have any basis for that, that she counseled this child what to say? Do you have any basis to ask that, mother, someone told you not to talk to you?

MR. WEBER: Yes, I have a basis. I have seen --

THE COURT: Gentlemen, we will -- we will discuss this later. Let's do Dylan. We can discuss it later and decide what will be done relative to further witnesses. Right now, Dylan is our witness, right?

And you are getting hungry, and you want to get out to lunch and so do I. So we are going to ask you a few more questions. You remember in the office earlier this morning when we were all there, you promised that you would listen and you would keep your voice up and you would tell the truth and answer the questions? Do you remember that? Will you still do that for me?

MASTER STUART: (Nodding head affirmatively.)

THE COURT: If you will do that, we will be able to get you out to lunch much sooner, if you will do that. So let's answer loudly and truthfully everything that these gentlemen are going to ask you. All right.

MR. WEBER: Your Honor, before we begin, I ask that his responses that are not words be reflected on the record, his movements or indications to an answer.

THE COURT: Absolutely.

DIRECT EXAMINATION

BY MR. CARROLL:

Q. Dylan, tell us what your name is.

MASTER STUART: I already said it.

THE COURT: I know.

Q. I know. I said you have to speak, tell us what your name is.

THE COURT: Go ahead, Dylan, tell us what your name is.

A. Dylan.

Q. Can you spell for us your first name?

A. D Y L A N.

THE COURT: Excellent.

Q. Dylan, how old are you?

A. Five.

Q. How many fingers are you holding up?

A. Five.

Q. Four fingers and a thumb, I guess. Okay. What grade are you in in school?

A. Kindergarten.

Q. What is your teacher's name?

A. Mrs. Copeland.

Q. Dylan, do you know how to count?

A. Yes.

Q. Can you count to ten for me?

A. One, two, three, four, five, six, seven, eight, nine, ten.

Q. And how about the alphabet, do you know your ABCs?

A. (Nodding head affirmatively.)

Q. You cannot nod, you have to say "yes" or "no."

A. Yes.

Q. And start them for me.

A. A.

Q. Keep going.

A. B, C, D, E, F, G.

Q. Okay, good. You can go all the way to the end?

A. Uh-huh,

Q. You can go to Z? All right.

Dylan, I want to talk to you just a little bit about your Uncle Troy. Do you know who I'm talking about when I say Uncle Troy?

A. (Nodding head affirmatively.)

Q. You have to say "yes" or "no."

A. Yes.

Q. And did you live with Uncle Troy for some time?

A. (Nodding head affirmatively.)

Q. You have to say "yes" or "no."

A. Yes.

THE COURT: You can say "yes" or "no."

A. Yes.

Q. When you lived with Uncle Troy, Dylan, did other people live in the house also?

A. (Nodding head affirmatively.)

Q. Say "yes" or "no."

A. Yes.

Q. And who were some of the people that lived there?

A. My mom, my dad, my grandpa.

Q. How about your brothers, did they live there?

A. (Nodding head affirmatively.) Yes.

Q. What is your brothers' names?

A. Devon and Blaine.

Q. You have to take your finger away from your mouth. Tell us your brothers' names again.

A. Devon and Blaine.

Q. Okay. Dylan, did there come a time when you were at your grandfather's house, when you were living there, that something happened between you and Uncle Troy, something bad?

THE COURT: It is all right to answer that, Dylan. Just tell us truthfully "yes" or "no."

A. Yes.

Q. All right. And, Dylan, if I ask you to tell us what that was, can you say what happened, what Troy did to you?

A. No.

Q. If I ask you specifically, did he touch you someplace, can you tell us if he did or didn't?

A. No.

Q. And why won't you tell us? You have to say.

A. No. I don't know.

Q. Your answer is "I don't know." Okay. Do you remember speaking to the detective that you saw this morning?

A. Yes.

Q. Did you tell her what Uncle Troy did to you?

A. No.

Q. Do you remember going to the police department and talking to her?

A. Yes.

Q. And was your mom there?

A. Yes.

Q. And did you talk to the detective with your mother in the same, I guess, small room?

A Yes.

Q. Okay. Have you spoken to your father about what Uncle Troy did to you?

A. Yes.

Q. And if I ask you to tell us what that was, what Uncle Troy did to you, will you tell us today?

A. No.

MR. CARROLL: That's all the questions that I have, your Honor.

THE COURT: Attorney Weber?

CROSS-EXAMINATION

BY MR. WEBER:

Q. Dylan, if you told your father about it, and who else did you tell about it besides your father?

A. The detective.

Q. Okay. Why won't you tell us? Is it because you are here under oath today? You have to speak your answer.

A. I don't know.

Q. What did Troy do to you? Are you able to answer that question?

A. No.

Q. If -- why are you comfortable in telling your father but not telling the Court?

A. I don't know.

Q. Are you afraid of what you will say?

A. (Nodding head affirmatively.)

Q. What are you afraid of? Are you afraid that the Judge will be mad at you?

A. (Shaking head negatively.)

Q. You are shaking your head no? Dylan, could you speak your answer?

A. Because I'm shaking my head no.

Q. Are you afraid that your father will be disappointed if you tell us what happened?

A. No.

Q. Why won't you tell us what happened?

A. I don't know.

THE COURT: Is it because Uncle Troy is sitting here listening to you, Dylan?

MASTER STUART: (Shaking head negatively.)

THE COURT: No, that's not the reason, either?

MR. WEBER: Would you speak your answer, please?

MASTER STUART: No.

Q. Well, if it is not Uncle Troy, and if it is not the Judge and it is not your father, why is it that you won't tell us what happened?

A. I don't know.

Did you tell your Aunt Sue about what happened?

A. (Shaking head negatively.)

Q. Did you tell -- your answer is no?

A. No.

Q. Did you not tell Sue about anything?

A. No.

Q. Did you tell Cindy?

A. No.

Q. The only one you have told it to is your father and the detective --

A. (Nodding head affirmatively.)

Q. -- is that right?

A. Uh-huh.

Q. No one else?

A. No one else.

Q. How about the lady in Pennsylvania? Did you talk to her about it?

A. Yes.

Q. You did?

A. Yes.

Q. What did you tell her?

A. I don't know.

Q. Did you tell her the truth or did you lie?

THE COURT: It is all right, you can answer it.

A. A little bit. A little bit.

Q. You lied a little bit --

A. (Nodding head affirmatively.)

Q. -- is that right?

A. (Nodding head affirmatively.)

Q. And what did you tell her that was a lie?

A. I don't know.

Q. Well, you said you lied. You must know what is a lie and what isn't a lie.

MR. CARROLL: Object, your Honor. He answered that.

THE COURT: He answered it a little bit.

Q. What did you tell her that is a lie?

MR. CARROLL: Object, he answered that.

MR. WEBER: He hasn't answered that.

MR. CARROLL: He answered that.

THE COURT: Can you tell us, Dylan?

MASTER STUART: (Shaking head negatively.)

THE COURT: You can't, all right.

Q. You say you lied to the lady in Pennsylvania?

A. (Nodding head affirmatively.)

Q. The answer is yes?

A. Uh-huh.

Q. Did you lie to Detective Johnstonbaugh?

A. (Shaking head negatively.)

THE COURT: The answer is no.

Q. You answered no. Can you speak your answer?

A. No.

Q. Did you lie to your father?

A. No.

Q. I'll ask you one more time, Dylan, will you tell us what happened? Will you do that?

THE COURT: It is all right, Dylan. Will you do that?

THE WITNESS: (Shaking head negatively.)

Q. No?

A. No.

Q. And did anyone ask you to give that answer or is that your own answer? Do you understand my question?

A. (Nodding head affirmatively.)

Q. Did someone ask you to answer no to those questions? Yes or no.

A. No.

Q. No one told you to get up here and say no, that you didn't want to talk about it; is that right?

MR. CARROLL: I object, your Honor.

THE COURT: All right, he answered that.

Q. Has anyone asked you to get up here and say: No, you don't want to talk about it?

MR. CARROLL: I object, your Honor.

A. No.

THE COURT: Last question and the answer is no.

Q. Did anyone tell you to come up here and tell the truth? Dylan, you have to speak your answer so the court reporter can hear you.

A. I don't know.

THE COURT: Dylan, has everyone told you to tell the truth?

MASTER STUART: I don't know.

THE COURT: Okay.

Q. Do you know if anyone told you to lie?

MR. CARROLL: I object, your Honor.

A. No.

THE COURT: The answer to that is no.

MR. WEBER: Okay.

Q. So if everyone asked you to tell the truth, why won't you tell us?

A. I don't know.

MR. WEBER: I have nothing further, your Honor.

THE COURT: Do you have anything further?

MR. CARROLL: No, your Honor.

THE COURT: All right, Dylan, thank you very much. Push that aside, will you? Push that aside. Push it the other direction. Thank you very much.

MR. CARROLL: I explained that the other two are coming tomorrow morning.

THE COURT: 10:30?

MR. CARROLL: Yes. She gets off work at 8:30, Monroe Falls, so I'm assuming 10:30 is safe.

THE COURT: Be here at 10:15 to finish up.

(Whereupon an adjournment was had to 10:30 a.m., Friday, February 18th, 2000, at which time the following proceedings were had.)

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO,
Plaintiff,

Case No. CR 99 10 2211
JUDGE SPICER

v.

ORDER

TROY R. STUART,
Appellant.

On February 2, 2000 and pursuant to Evid.R. 807, the State of Ohio filed notice of intent to introduce at trial statements made by Dylan Stuart. The 803 hearing was held on February 17, 2000 and Dylan Stuart was found to be competent to testify. Immediately thereafter, the 807 hearing was conducted in open court. Present in Court were Assistant Summit County Prosecutor Michael Carroll, defense counsel Edward Weber and Defendant, Troy Stuart.

The State of Ohio called six witnesses, namely: Detective Tera Johnstonbaugh, Springfield Police Department; Lorin Stuart - Dylan's father; Lisa Stuart - Dylan's mother; Dylan Stuart - age five years; Susan L. Burgess, paternal aunt; and Cindy L. Halley, paternal aunt.

All witnesses were examined and cross-examined by counsel.

The defense called Shelley Kekic, Intake Department for investigating abuse and neglect cases of Children Services Board, who was examined and cross-examined by counsel.

In conclusion, a briefing schedule was established and complied with.

Prior to the 807 hearing, the 803 hearing was held in chambers with Assistant Prosecutor Carroll, defense counsel Weber, and Defendant, Troy Stuart, present.

The Court initially inquired of Dylan Stuart, followed by Prosecutor Carroll and Attorney Weber. The Court, at the conclusion, made the determination that Dylan was competent to testify.

The Court from its observations, perceptions and evidence produced at this hearing, found Dylan Stuart to be a prepossessing, physically and mentally healthy five year old boy. He was oriented to person, place and time relative to self and family. He was reasonably compliant in responding to questions. Although some "squirming and fidgeting" was observed, his overall attention span appeared

to be average and consistent with his age level. Dylan displayed accurate perception for common items and had a fundamental knowledge of numbers and colors, again consistent with age. He has an understanding and appreciation for"telling the truth" Verbal skills in general were good for a child of his age.

Based on all of the above, the Court determined that Dylan was at that time competent to testify.

The 807 hearing followed immediately upon conclusion of the 803 hearing on February 17, 2000.

At the 807 hearing, Dylan initially responded well to neutral, non-emotional questions unrelated to sexual activity. When asked about any matters or details of a sexual nature, he became sullen, fidgety, unresponsive, hanging and shaking his head in a negative way and hiding his face. Any response was negativistic, and he always responded "no" if pressed, encouraged or cajoled to respond. It ultimately became clear that Dylan was not, would not, and could not be coaxed, pressured, or cajoled into answering questions in the sexual area and relative to Uncle Troy. It was clear that Dylan, although physically present arid competent, was in fact unavailable to testify relative to any substantive matters and issues before the Court in this case. There is no reasonable basis for this

Court to believe or assume that availability in this area will improve or change. Thus, Dylan is found to be not reasonably available to testify in this case. Having found Dylan unavailable, we must consider the admissibility of Dylan's out-of-court statements to others proposed to be used by the state at trial.

Under Evid. Rule 807, out-of-court statements of a child under 12 years of age are admissible if all of the following apply:

(1) *Indicia* of Trustworthiness;

(2) The child's testimony is not reasonably obtainable;

(3) Independent proof of sexual act; and

(4) Notice as required.

Upon hearing, the Court determined from the evidence that the child is under 12 years and, for stated reasons, is not reasonably available to testify and not likely to become so. The Court further found that Notice of the Intent to use out-of-court statements was timely made, thus meeting the requirements of 2 and 4.

The Court must next consider 1 and 3 - trustworthiness and independent proof. The evidence will reflect that, prior to Lisa Stuart's termination of her work, the Defendant was the regular "babysitter" for Dylan while his parents worked. On a visit to paternal aunt, Susan Burgess, Dylan was observed with his hands in pants (diaper). When told, "Hey, boy, quit that," he immediately replies "Uncle Troy does that."

In March of 1997, while Cindy Hailey was babysitting Dylan, she observed Dylan "playing with his penis." She states "Dylan, you should not be doing that" and he immediately responds, "Uncle Troy does." When asked what else does Uncle Troy do, Dylan responds, "Plays with his butt and kisses his pee-pee." Hailey then shared this information with Burgess. Clearly, these responses by Dylan on those occasions were spontaneous, clearly not orchestrated or directed. In both cases, there was no question as to who performed this activity, it was "Uncle Troy." There was only one person meeting that description and known to all three.

Thereafter, Lorin Stuart, father of Dylan, approached Dylan regarding allegations of Uncle Troy's touching in "wrong places" and Dylan said "yes - Uncle Troy touched his pee-pee" while babysitting. Once again, a spontaneous response to father's general question, but a very specific

answer under circumstances that were clearly possible. The same date, the mother, Lisa, speaks with Dylan and receives the same information from Dylan. Dylan's statement to her was spontaneous and responsive, consistent with statements to three others. Thereafter, Dylan next relates consistent sexual acts of Uncle Troy on his person to Detective Johnstonbaugh.

In this case, considering the totality of the circumstances, the Court find particularized guarantee that Dylan's statements are trustworthy. These *indicia* include the spontaneity of the statements to aunts and parents, the internal consistency as to all, the mental state of this child, Dylan's lack of motive to fabricate, his use of terminology unexpected of a child of similar age, the means by which the statements were elicited, as well as the amount of time between acts and statements and circumstances of this case. In summary, Dylan's statements consistently referred only to Uncle Troy and what he did. The terminology of "kiss his pee-pee" would not normally be expected of a four/five year old. The fact of the babysitting arrangement offered ample opportunity over a specific period of time. The unprovoked or directed statements to the aunts had a particularly high degree of spontaneity and consistency.

Lastly, we consider the requirement of independent proof of sexual acts. Defendant was arrested on October 6,

1999 and taken into custody. Immediately after his removal from the home, Lorin Stuart and Robert Stuart, father of Lorin and Troy, entered Troy's bedroom. Both observed a letter on the floor near Defendant's bed which was picked up by Defendant's father Robert. Lorin was next to his father and able to read the letter in Defendant's handwriting. It read in part, "To Whom It May Concern. I've got monsters to so pray upon kids because they don't hurt me." The letter was taken by Defendant's father, placed in his pocket with a comment regarding its eventual use to get Defendant help. Lorin has not seen the letter since it entered his father's pocket on October 6, 1999. Lorin reduced this experience and his observation to writing and immediately shared it with law enforcement. The statement of the Defendant, in his hand written letter, left in his bedroom, and found by immediate members of his family, constitutes independent proof of sexual behavior and conduct.

The Court finds the State of Ohio has met its burden in proof under Evid.R. 807, namely: (1) *Indicia* of Trustworthiness; (2) The child's testimony is not reasonably obtainable; (3) Independent proof of sexual act; and (4) Notice as required, relative to use of out-of-court statements made by Dylan B. Stuart.

In summation, the Court finds that Dylan Stuart is not available for testimony based on observation and performance or lack thereof of Dylan in Court on February 17, 2000.

The unavailability is not with respect to his physical presence as he could be picked up and physically placed in the courtroom; the real issue is whether this now five year-old child will be able to give testimony about events at issue in this case. The Court finds ample evidence to prove to its satisfaction that Dylan Stuart would not give testimony on the issues and is therefore not reasonably available.

Defendant's February 10, 2000 Motion to Strike is denied.

It is so ordered.

/s/ Mary F. Spicer
JUDGE MARY F. SPICER

cc: Assistant Prosecutor Michael Carroll
Attorney Edward C. Weber

dle
CR99-2211

28 UNITED STATES CODE SECTION 1257

§ 1257. State courts; appeal; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

HISTORY: Proposed 1789, Adopted 1791

AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other

crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

HISTORY: Proposed 1866, Adopted 1868

OHIO REV. CODE ANN. SECTION 2901.02
RAPE; EVIDENCE; MARRIAGE OR COHABITATION NOT DEFENSES TO RAPE CHARGES

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially unpaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. if the offender under division (A)(l)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in section 3719.41 of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section 2929.14 of the Revised Code that is not less than five years. If the offender under division (A)(l)(b) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(1)(b) of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its

inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any heating in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the

services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

HISTORY: 1997 H 32, eff. 3-10-98

1995 S 2, eff. 7-1-96; 1993 S 31, eff. 9-27-93; 1985 H 475; 1982 H 269, § 4, S 199; 1975 S 144; 1972 H 511

UNCODIFIED LAW

1982 H 269, § 4, eff. 1-5-83, amended 1982 S 199, § 10, eff. 1-5-83, to read, in part: "[2907.02], as amended by [1982 S 199], ... shall take effect on July 1, 1983. and shall apply only to offenses committed on or after July 1, 1983."

OHIO REV. CODE ANN. SECTION 2907.05
GROSS SEXUAL IMPOSITION

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the judgment or control of the other person or of one of the other persons by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(3) The offender knows that the judgment or control of the other person or of one of the other persons is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with the other person's consent for the purpose of any kind of medical or dental examination, treatment, or surgery.

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

(5) The ability of the other person to resist or consent or the ability of one of the other persons to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age.

(B) Whoever violates this section is guilty of gross sexual imposition. Except as otherwise provided in this section, a violation of division (A)(1), (2), (3), or (5) of this section is a felony of the fourth degree. If the offender under division (A)(2) of this section substantially impairs the judgment or control of the other person or one of the other persons by administering any controlled substance described in section 3719.41 of the Revised Code to the person surreptitiously or by force, threat of force, or deception, a violation of division (A)(2) of this section is a felony of the third degree. A violation of division (A)(4) of this section is a felony of the third degree.

(C) A victim need not prove physical resistance to the offender in prosecu-tions wider this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual

activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the de-fendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility o(the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the Court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

HISTORY: 1997 H 32 eff. 3-10-98

1993 S 31, eff. 9-27-93; 1990 H 208; 1977 H 134; 1975 S 144; 1972 H 511

Evid R 802. HEARSAY RULE

Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.

HISTORY: Adopted eff. 7-1-80

EVID R 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) Excited utterance

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing, mental, emotional, or physical condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify. fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence, but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony

of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circum-stances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in record kept in accordance with the provisions of paragraph (6)

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law

enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics.

Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law.

(10) Absence of public record or entry

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 901(B)(10) or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or

other similar facts of personal or. family history, contained in a regularly kept record of religious organization[3].

(12) Marriage, baptismal, and similar certificates

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like,

(14) Records of documents affecting an interest in property

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed,

---

[3]So in 62 OS(2d) xlvi; federal rule reads " a religious organization."

if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents

Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications

Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Reputation concerning personal or family history

Reputation among members of his family by blood, adoption, or marriage or among his associates, or in the com-munity, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood,

adoption or marriage, ancestry, or other similar fact of his personal or family history.

(19) Reputation concerning boundaries or general history

Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the com-munity or state or nation in which located.

(20) Reputation as to character

Reputation of a person's character among his associates or in the community.

(21) Judgment of previous conviction

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(22) Judgment as to personal, family, or general history, or boundaries

Judgments as proof of matters of personal, family or general history, or boundaries, essentlal to the judgment, if the same would be provable by evidence of reputation. [Adopted eff. 7-1-80]

EVID R 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(A) Definition of unavailability

"Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement

for the purpose of preventing the witness from attending or testifying.

(B) Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing, of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

(2) Statement wider belief of impending death. In a prosecution for homicide or in a civil action or pro-ceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to his or her impending death.

(3) Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a

reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (a) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated, or (b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Statement by a deceased or incompetent person. The statement was made by a decedent or a mentally incompetent person, where (a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party, and (b) the statement was made before the death or the development of the incompetency, and (c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

[Adopted eff. 7-1-80; amended eff. 7-1-81, 7-1-93]

EVID R 807. HEARSAY EXCEPTIONS, CHILD STATEMENTS IN ABUSE CASES

(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual act performed by, with, or on the child or describing any act of physical violence directed against the child is not excluded as hearsay under Evid. R. 802 if all of the fol-lowing apply:

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trust-worthiness that make the statement at Least as reliable as statements admitted pursuant to Evid. R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether

there is independent proof of the sexual act or act of physical violence.

(2) The child's testimony is not reasonably obtainable by the proponent of the statement.

(3) There is independent proof of the sexual act or act of physical violence.

(4) At least ten days before the trial or bearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances sur-rounding the statement that are claimed to indicate its trustworthiness.

(B) The child's testimony is "not reasonably obtainable by the proponent of the statement" under division (A)(2)-of this rule only if one or more of the following apply:

(1) The child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges The child to both describe the acts described by the statement and to testify.

(2) The court finds all of the following:

(a) the child is absent from the trial or hearing;

(b) the proponent of the statement has been unable to procure the child's attendance or testimony by process or other reasonable means despite a good faith effort to do so;

(c) it is probable that the proponent would be unable to procure the child's testimony or attendance if the trial or hearing were delayed for a reasonable time.

(3) The court finds both of the following:

(a) the child is unable to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity;

(b) the illness or infirmity would not improve sufficiently to permit the child to testify if the trial or hearing were delayed for a reasonable time.

The proponent of the statement has not established that the child's tes-timony or attendance is not reasonably obtainable if the child's refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the child from attending or testifying.

(C) The court shall make the findings required by this rule on the basis of a hearing conducted outside the presence of the jury and shall make findings of fact, on the record, as to the bases for its ruling.

HISTORY: Adopted eff. 7-1-91

Supreme Court, U.S.
FILED
FEB 8 2002
CLERK

NO. 01-1001

In The
Supreme Court of the United States
October Term, 2001

TROY R. STUART,
Petitioner,

v.

STATE OF OHIO,
Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SHERRI BEVAN WALSH
Prosecuting Attorney

***PHILIP D. BOGDANOFF**
Assistant Prosecuting Attorney
Summit County Safety Bldg.
53 University Ave., 6th Fl.
Akron, OH 44308
(330) 643-2791
Reg. No. 0018887

Attorney for Respondent
**Counsel of Record*

***NATHAN A. RAY**
Attorney at Law
Burdon & Merlitti
137 South Main St.
Suite201
Akron, OH 44308
(330) 253-7171
Reg. No. 0041570

Attorney for Petitioner
**Counsel of Record*

QUESTION PRESENTED FOR REVIEW

SHOULD A WRIT OF CERTIORARI BE GRANTED WHERE THE PETITIONER DID NOT RAISE A FEDERAL ISSUE REGARDING THE CONSTITUTIONALITY OF OHIO EVID.R. 807 IN THE STATE COURTS?

TABLE OF CONTENTS

	Page(s)
Question Presented For Review.....	ii
Table of Contents.....	iii
Table of Authorities.....	iv
Statement of the Case and Facts	1
Reasons for Denying the Writ	2
Ohio Evid.R. 807 Does Not Deny The Petitioner His Sixth Amendment Right To Confront His Accuser Because This Rule Indicates Hearsay Statements Can Only Be Admitted Where They Are Supported By Particularized Guarantees Of Trustworthiness	2
Conclusion	10

TABLE OF AUTHORITIES

Cases	**Page(s)**
Idaho v. Wright, 497 U.S. 805 (1990)	6
Maryland v. Craig, 497 U.S. 836 (1990)	5, 6, 9
State v. Boston, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989)	6
State v. Cardosi, 122 Ohio App.3d 70, 701 N.E.2d 44 (1997)	7
Street v. New York, 394 U.S. 576, (1969)	4, 5

Statutes

Amendment VI, U.S. Constitution	passim
Evid.R. 807	passim

NO. 01-1001

In The
Supreme Court of the United States
October Term, 2001

TROY R. STUART,
Petitioner,

v.

STATE OF OHIO,
Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent State Of Ohio Respectfully Prays That This Court Deny A Writ Of Certiorari And Dismiss The Petition.

STATEMENT OF THE CASE AND FACTS

The Respondent herein incorporates the Statement of the Case and Statement of Facts as presented in Petitioner's Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

OHIO EVID.R. 807 DOES NOT DENY THE PETITIONER HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER BECAUSE THIS RULE INDICATES HEARSAY STATEMENTS CAN ONLY BE ADMITTED WHERE THEY ARE SUPPORTED BY PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS.

The Petitioner contends that the trial court improperly admitted hearsay testimony of a child declarant in violation of his sixth amendment right to counsel. Here, the trial court followed Ohio Evid.R. 807 when allowing the victim's out-of-court statements to be admitted at trial. This rule states that a child declarant's statements are admissible if these statements are reliable based upon the totality of the circumstances of the statement, the child's testimony is not reasonably obtainable, there is independent proof of the sexual act and the defendant is given notice of the statement. Ohio Evid.R. 807(A)(1-4). The rule also states that a child's

statement is not reasonably obtainable if "the child refuses to testify concerning the subject matter of the statement or claims a lack of memory of the subject matter of the statement after a person trusted by the child, in the presence of the court, urges the child to both describe the acts described by the statement and to testify." Ohio Evid.R. 807(B)(1).

Here, the Petitioner admits that the procedural aspects of this rule were followed in this case when admitting the hearsay testimony. In essence, Petitioner argues that Ohio Evid.R. 807 violates his sixth amendment right to confrontation by allowing into evidence the victim's hearsay statements without a determination that he is unavailable to testify or an appropriate guarantee that his statements were trustworthy.

Respondent contends that Petitioner has not properly preserved this federal issue in state courts. The

Ohio Ninth District Court of Appeals and the trial court never addressed whether Ohio Evid.R. 807 denied the Petitioner his constitutional right to confront his accuser. This Court has indicated that where the state court has failed to review the federal matter, it is assumed that the petitioner failed to properly present the issue:

> Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. *See* 28 U.S.C. §§1257(2), 1257(3); *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945). Moreover, this Court has stated that when, as here, the highest court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. *See, e.g., Bailey v. Anderson, supra*; *Chicago, I. & L. R.*

> *Co. v. McGuire*, 196 U.S. 128, 131-133 (1905).

Street v. New York, 394 U.S. 576, 581-582 (1969).

Respondent contends the Petitioner failed to challenge the constitutionality of Ohio Evid.R. 807 in state courts and has failed to preserve this federal issue on appeal.

Assuming this Court finds that Petitioner preserved this issue, the Petitioner's argument must still be rejected. Ohio Evid.R. 807 does not violate Petitioner's sixth amendment right to confront his accusers. This Court has indicated that the sixth amendment does not guarantee the defendant an absolute right to a face-to-face meeting with a witness who testifies against him at trial. *Maryland v. Craig*, 497 U.S. 836, 849 (1990).

> As we suggested in *Coy*, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical,

> face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. *See* 487 U.S. at 1021 (citing *Roberts, supra*, 448 U.S. at 64; *Chambers, supra*, at 295); *Coy, supra*, 487 U.S. at 1025 (O'CONNOR, J., concurring).

Id. at 850.

This court has recognized that protecting child victims of sex crimes from trauma and embarrassment is a compelling state reason that outweighs a defendant's right to confront his accuser. *Id.* at 852. Here, Ohio Evid.R. 807 was specifically enacted to protect the welfare of a child rape victim. *See State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989).

Further, this rule requires that the trial court make a case specific finding that the declarant's statements are reliable. *See Idaho v. Wright*, 497 U.S. 805 (1990). This rule indicates the trial court is to find that the declarant's "statement provides particularized guarantees of

trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804 based upon the totality of the circumstances." This provision codifies the sixth amendment confrontation requirements required by this Court. *State v. Cardosi*, 122 Ohio App.3d 70, 75, 701 N.E.2d 44 (1997). Here, both the trial court and the Ohio Ninth District Court of Appeals indicated that the surrounding circumstances of the victim's statement indicate that these statements were reliable and trustworthy.

Finally, the Ohio rule requires that a child's hearsay statements are only admissible if the child is unable to testify about the sexual acts. Ohio Evid.R. 807(B)(1). Here, the trial court found that the victim became upset when asked about the sexual abuse in front of the defendant:

> At the 807 hearing, Dylan initially responded well to neutral, non-emotional questions unrelated to sexual activity. When asked about

> any matters or details of a sexual nature, he became sullen, fidgety, unresponsive, hanging and shaking his head in a negative way and hiding his face. Any response was negativistic, and he always responded "no" if pressed, encouraged or cajoled to respond. It ultimately became clear that Dylan was not, would not, and could not be coaxed, pressured, or cajoled into answering questions in the sexual area and relative to Uncle Troy. It was clear that Dylan, although physically present and competent, was in fact unavailable to testify relative to any substantive matters and issues before the Court in this case. There is no reasonable basis for this Court to believe or assume that availability in this area will improve or change. Thus, Dylan is found to be not reasonably available to testify in this case. Having found Dylan unavailable, we must consider the admissibility of Dylan's out-of-court statements to others proposed to be used by the State at trial.

Implicit in the court's findings in that Dylan was unable to testify based upon the emotional distress of testifying in front of the defendant. Here, there was a

case specific finding of necessity why Dylan could not testify in this case. *Compare, Maryland v. Craig*. Therefore, the trial court did not violate Petitioner's sixth amendment right to confrontation by admitting the child's hearsay statements to be admitted at trial.

Based on the foregoing arguments, this Court must deny this writ.

CONCLUSION

The Petitioner failed to assert that Ohio Evid.R. 807 denied the Petitioner his right to confront his accuser in the lower courts. The state trial court and appellate court never addressed this federal issue. Therefore, this Court should not review this issue. Further, Ohio's evidentiary rule that allows a child's hearsay statement to be admitted in child sex abuse cases does not violate Petitioner's sixth amendment right to confront his accusers. Therefore, Petitioner's Application for a Writ should be denied.

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney

PHILIP D. BOGDANOFF (0018887)
Assistant Prosecuting Attorney
Summit County Safety Building
53 University Avenue, 6th Floor
Akron, Ohio 44308
(330) 643-2791